MAR 24 2004
OFFICE OF THE CLERK

(14)

No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA, LIMITED
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

THOMAS D. WILCOX *
CARROLL & FROELICH, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

* Counsel of Record

Attorneys for Amicus Curiae

March 24, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a foreign cargo owner who shipped goods to an inland destination in the United States and who uses a shipping intermediary is bound by the liability limitations (the Himalaya Clause) in the intermediary's bill of lading, or those in the bill of lading that an ocean carrier issued to the intermediary, when suing a railroad that subcontracted with the ocean carrier to deliver the goods to their destination.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. DUELING BILLS OF LADING	4
II. WHICH HIMALAYA CLAUSE APPLIES?	5
III. WHO OR WHAT IS ICC?	6
IV. WITH RESPECT TO THE ACTUAL CARRIERS, ICC ACTED AS AN AGENT FOR THE SHIPPER	8
V. THE ACTUAL CARRIER'S BILL OF LADING BINDS ALL PARTIES	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Aquascutum of London, Inc. v. S.S. American Champion, 426 F.2d 205 (2nd Cir. 1970) 8
Chicago, St. Paul & Pacific R.R. Co. v. Acme Fast Freight, 336 U.S. 465 8
Great Northern Railway Co. v. O'Connor, 232 U.S. 508 (1914) 11
Robert C. Herd & Co., Inc. v. Krawill Machine. Corp., 359 U.S. 297 5
Hoffman-LaRoche v. M/V TFL Jefferson et al., 731 F.Supp. 109, (S.D.N.Y. 1990) 8
Ins. Co. of North America v. S.S. American Argosy, 732 F.2d 299 (2nd Cir. 1984) 9
James N. Kirby, Pty Ltd. D/B/A Kirby Engineering, and Mmi General Insurance Limited v. Norfolk Southern Railway Company, 300 F.3rd 1300 (11th Cir. 2002) ..... *passim*
Mickinberg v. Baltic Steamship Co., Rice Unruh, Reynolds Company, and Uts, A Division of Universal Maritime Services, 988 F.2d 327 (2nd Cir. 1993) 10
Modern Office System, Inc. v. Aim Caribbean Express, Inc., 802 F.2d 617 (DC PR 1992) 9
Nippon Fire & Marine Insurance Co., Ltd v. Skyway Freight Systems, Inc., 235 F.3d 53 (2nd Cir. 2000) 12
M. Prusman Ltd. v. M/V Nathanel, 670 F.Supp. 1141 (S.D.N.Y. 1987) 9

STATUTES

Carriage of Goods by Sea Act (COGSA), 46 U.S.C. app. 1300-1315 ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.* 6
46 U.S.C. app. 1703(17) 7
46 U.S.C. app. 1703(19) 6
46 U.S.C. app. 1707(a) 7
46 U.S.C. app. 1707 13
46 U.S.C. app. 1709 13

LEGISLATIVE

Senate Report No. 98-3, (98th Congress, 1st Session) 7

IN THE

Supreme Court of the United States

No. 02-1028

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA, LIMITED
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

National Association of Waterfront Employers (NAWE) member companies perform stevedoring and/or marine terminal services at most ports in the United States and in some ports in foreign countries. One NAWE member,

[1] In accordance with this Court's Rule 37.6, counsel of record states that he is the sole author of this brief, that no entity other than the named *amicus* party has made a monetary contribution to the preparation of this brief, and that NAWE member, Lambert's Point Docks, has made no contribution other than its annual dues assessment to *amicus*. Pursuant to Rule 37.2(a) blanket letters of consent have been filed with the Clerk.

Lambert's Point Docks in Hampton Roads, Virginia is owned by Petitioner. It and other NAWE member companies are those companies which load and unload cargo on and off vessels calling at ports in the United States, including Puerto Rico, and some foreign countries, and as such have a very real interest in ocean carrier bills of lading pursuant to the Carriage of Goods by Sea Act ("COGSA") and the precise language of the Himalaya Clause in those bills. NAWE members are quite concerned about whether their responsibilities and liabilities are to be governed by a bill of lading issued by their customer ocean carrier, or by a 'bill of lading' issued by a stranger transportation intermediary of whom they have no knowledge. The answer to that question will dictate what NAWE members must do in the future to understand their rights and sponsibilities with respect to cargo they handle as well as what others, such as Petitioner, must do.

This case involves the shipment of ten containers of machinery from a point in Australia destined for Huntsville, Alabama via the ports of Sydney, Australia and Savannah, Georgia. It is common knowledge that such a shipment required the services of (1) a transport entity in Australia to deliver the containers to (2) a marine terminal in Sydney, Australia where the containers were loaded by (3) a stevedore entity onto a (4) vessel, here operated by Hamburg Sud (Columbus Line), an (5) American stevedore to unload the containers when the vessel arrived at the (6) marine terminal in Savannah under instructions of Hamburg Sud (Columbus Line) delivered by the terminal operator to (7) Petitioner, Norfolk Southern Railway Company for transportation to Huntsville, Alabama. Unfortunately, the train was derailed en route to Huntsville and the machinery damaged. The shipper was paid by its insurer for the loss and an action was brought to recover from Norfolk Southern the amount paid by the insurer to the shipper.

Although the present action is between a shipper and its insurer and the actual ocean carrier's designated inland carrier, this Court's decision could affect all parties providing actual transportation services pursuant to the ocean carrier's bill of lading, including the stevedore and marine terminal operator members of NAWE, who perform the stevedoring and marine terminal services enumerated as (5) and (6) above in the case of imported goods and (2) and (3) in the case of exports. This Court's decision as to which bill of lading governs, that of the carrier which actually performs the transportation or that of a transportation intermediary which performs no actual transportation, will dictate what NAWE members and others in the actual transportation chain must do in the future to understand and protect their rights and responsibilities with respect to the cargo they handle.

SUMMARY OF ARGUMENT

The decision of the court below, *James N. Kirby, Pty Ltd., d/b/a Kirby Engineering and Mmi General Insurance Limited v. Norfolk Southern Railway Company*, 300 F.3d 1300 (11th Cir. 2002) holding that the shipping intermediary's bill of lading controlled the liability of the ocean carrier because there was no "privity" between the ocean carrier and the shipper, and therefore the U.S. inland carrier, with the owner of the goods shipped *(Kirby* at 1305, 1307 and 1309) is wrong.

There was the necessary "privity" between Kirby, the shipper, and the ocean carrier because, at all times, with respect to the actual ocean carrier, the intermediary, whatever denominated, be it broker, forwarder, or non-vessel operating-common carrier (NVOCC), was the agent of the shipper with respect to the actual carrier, and the ocean carrier's bill of lading issued to the agent was binding on its principal, the shipper.

ARGUMENT

I. DUELING BILLS OF LADING

There were two bills of lading issued. The first was issued by International Cargo Control Pty Ltd. (ICC) to the shipper of the machinery, James N. Kirby, Pty Ltd., d/b/a Kirby Engineering (Kirby) who had sold the machinery to General Motors for delivery at Huntsville, Alabama. That bill of lading was issued 'to formalize the contract of carriage' entered into by Kirby with ICC to fulfill Kirby's 'obligation to deliver the machinery to Huntsville.' (*Kirby* at 1302). The second bill of lading was issued by Hamburg Sud to ICC for the actual movement of the machinery from Sydney to Huntsville via the port of Savannah and named ICC as shipper. The Hamburg Sud bill contained its own Clause Paramount, and its own Himalaya Clause that extended the bill's limitations on Hamburg Sud's liability to 'all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and independent contractors whatsoever.' (*Kirby* at 1303).

In essence, the Hamburg Sud bill of lading extended Hamburg Sud's Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315, limitation of liability to each and everyone, the actual participants in the transport of Kirby's containers. However, the court below held that because there was no "privity" between Hamburg Sud and Kirby, the Hamburg Sud bill of lading did not protect Norfolk Southern. In effect, by the court's reasoning, none of Hamburg Sud's contractors would have been protected. However, the court also stated had there had been the necessary "privity," then the clearly stated Hamburg Sud bill of lading would include Norfolk Southern.

> "This is not to say that a Himalaya Clause can never readily identify a well-defined class of persons that in-

> cludes inland carriers like Norfolk Southern. However, if the Himalaya clause is to extend inland, it must say so with specificity, as, for example did the Himalaya clause in the Hamburg Sud bill when it clearly identified as among its beneficiaries "all participating carriers (including inland) carriers. (emphasis added)" (*Kirby* at 1311).

However, since the court found there to be no "privity" between the shipper and the actual [ocean] carrier, it determined that the actual carrier's bill of lading did not apply. Thus, it found that intermediary's bill of lading was controlling and that its limitation of liability provision was too indefinite and broad to include Norfolk Southern.

II. WHICH HIMALAYA CLAUSE APPLIES

The legality of the Himalaya Clause is not an issue in this case, *Robert C. Herd & Co. Inc. v. Krawill Mach. Corp.*, 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed. 2d 820 (1958). Neither is this Court's requirement that contracts purporting to grant limitation of liability must be strictly construed and limited to their intended beneficiaries. The issue here is which bill of lading applies: that of a transportation intermediary or that of the ocean carrier actually providing the transportation. *Amicus* submits that it must be the latter. If not, then any shipper in combination with a transportation intermediary holding itself out as a carrier could—by a defective bill of lading—knowingly or unknowingly defeat the entire international shipping regime's liability provisions as set forth in COGSA. It simply makes no sense to hold that a shipping document issued by a non-vessel operating transportation intermediary takes legal precedence over an ocean bill of lading issued by an ocean common carrier which actually performs the contracted transportation. The fact that the intermediary appears as the "shipper" on the actual carrier's bill of

lading does not mean that the true owner of the goods shipped on whose behalf the intermediary was acting is not bound by the actual carrier's bill of lading.

III. WHO OR WHAT IS ICC?

A key issue in this case is who, or what, was ICC, identified by the court below as "an Australian freight forwarder." (*Kirby* at 1302). However, the trial judge described ICC as "an Australian cargo broker. ICC does not transport cargo, but rather arranges for cargo transportation by carriers." (Petitioner's Appendix C at 28a.). Unfortunately, the record below is silent as to what an Australian freight forwarder or cargo broker is, or can do, under Australian law. ICC's legal identity is important, because the court below indicates that the outcome of this case depends upon the relationship between ICC and the actual owner of the cargo shipped, Kirby (*Kirby* at 1305), and that if ICC was acting as an agent for Kirby when the shipping contract with the actual ocean carrier, Hamburg Sud, was made, its decision would have been in favor of Petitioner, Norfolk Southern. (*Kirby* at 1311).

Under applicable U.S. law in effect in 1997, namely the Shipping Act of 1984, 46 U.S.C. § 1701 *et seq.*, ICC was not an "ocean freight forwarder" as defined in § 3(19) of the Shipping Act (46 U.S.C. app. 1703(19)). That section requires that the shipments dispatched by the ocean freight forwarder be "from the United States." An ocean freight forwarder dispatches shipments via common carriers or otherwise arranges space for those shipments "on behalf of shippers." As the court below pointed out at page 1307, ICC clearly did not meet that requirement. COGSA has no definition of freight forwarder. While ICC did not actually transport the cargo, it nevertheless

issued to Kirby a bill of lading and assumed responsibility for the shipment to Huntsville. (*Kirby* at 1302). Under

applicable U.S. law, the Shipping Act of 1984, that would make ICC a "non-vessel-owning-common carrier," (or an "NVOCC"), which is defined as "a common carrier that does not operate vessels by which the ocean transportation is provided, *and is a shipper in its relationship with a common carrier*." (46 U.S.C. app. 1703(17)). (emphasis supplied)[2]

As a "common carrier," in order to function lawfully in the trade from Australia to the United States ICC would have had to file a complete "tariff" with the Federal Maritime Commission showing "all its rates, charges, classifications, rules and practices between all points or ports on its own route and on any through transportation route that has been established" and include sample copy of "any bill of lading, contract of affreightment, or other document evidencing the transportation agreement." (46 U.S.C. 1707(a)).

The record is silent as to ICC meeting its tariff filing obligations as an NVOCC under the Shipping Act. What is clear is that however described, ICC did not undertake to actually provide any of the ocean transportation it contracted for with Kirby and that Kirby knew it. As the dissenting judge below succinctly stated at *Kirby* page 1312:

> "There is nothing in the record which indicated that Kirby expected ICC to ship the goods other than by contracting it with another carrier. . . . When the bill of

---

[2] Comments of the Senate Committee on Commerce, Science and Transportation on Senate bill, S. 504, a predecessor to Senate bill, S. 47 which became Pub. L. 98-237, the Shipping Act of 1984, about "non-vessel-operating common carrier" should be noted. The Committee report states at page 20; "(17) 'Non-vessel-operating common carrier' gives statutory recognition to this marine operator who acts as a consolidator and intermediary between vessel operators and shippers of less-than—container loads. The shipper status of an NVO, in its relationship with the vessel operator, is intended to afford the NVOs the same protection against unjust discrimination." Senate Report No. 98-3, 98th Congress, 1st Session.

lading between Kirby and ICC was issued, Kirby knew that an inland carrier would have to be used, because of the destination being Huntsville, Alabama."

The dissent concludes that "Kirby knew from the start that the ultimate destination would have to be through an inland carrier, so it should not be able to prevail on the technicality of its lack of "privity" of contract." The plain fact is that ICC was acting as Kirby's agent and that Kirby (and its insurer) were bound by contracts entered into by ICC on Kirby's behalf.

IV. WITH RESPECT TO THE ACTUAL CARRIERS, ICC ACTED AS AN AGENT FOR THE SHIPPER

Who or what was, or is ICC, and what effect did its alleged bill of lading have on the actual participants in the through movement of goods in international waterborne commerce? Was the bill of lading it issued to Kirby any more than a contract between the shipper/owner of the goods and a transportation intermediary under which the latter undertakes to perform certain services on behalf of the shipper/owner, and thus is binding only those two parties? Obviously, ICC did not undertake to actually transport any machinery to Huntsville. It only agreed to make the necessary arrangements. Thus, ICC, with respect to Hamburg Sud and its subcontractors, was not acting as a common carrier, and the fact that it issued a document entitled "bill of lading" is in itself not determinative. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Acme Fast Freight*, 336 U.S. 465, 484, 93 L.Ed. 817, 69 S.Ct. 692 (1949). Simply arranging for transportation and not actually effecting it does not make a carrier. *Aquascutum of London, Inc. v. S.S. American Champion*, 426 F.2d 205, 210 (2nd Cir. 1970) and *Hoffman-Laroche v. M/V TFL Jefferson et al.*, 731 F.Supp 109, 111 (S.D.N.Y. 1990).

Amicus submits that a bill of lading issued by a transportation intermediary, such as an "Australian freight forwarder" or "cargo broker," or even an NVOCC, to its shipper principal (disclosed or not) can not trump the contractual relationship between the actual common carrier and the parties enumerated in that carrier's bill of lading for the transportation actually performed thereunder.

As one court has stated,

> "Thus for the purposes of the Shipping Act . . . the NVOCC is a hybrid; it is a common carrier with respect to the shippers who use its services: as such it files a rate tariff with the Federal Maritime Commission and is subject to all laws governing common carriers. With respect to the vessel and her owner, NVOCC is an agent of the shipper, and thus merely a customer. . . . indeed, only one customer among hundreds on any given voyage."
>
> "While the NVOCC is considered an agent of its shipper in relation to the vessel and her owner, the nature and scope of said agency is limited to the transportation services contract by the NVOCC on the shipper's behalf. The NVOCC is itself liable to the shipper by virtue of its own bill of lading, the tariff and the law applicable to the particular trade in which the NVOCC is involved." *Modern Office System, Inc. v. Aim Caribbean Express, Inc.* (DC, PR 1992), 802 F. Supp. 617, 622), *citing Ins. Co. of North America v. S.S. American Argosy*, 732 F.2d 299, 301 (2nd Cir. 1984), *and M. Prusman Ltd. v. M/V Nathanel*, 670 F.Supp.1141 (S.D.N.Y. 1987).

The court below at *Kirby* pages1304-5 found that the ocean carrier's (Hamburg Sud) bill of lading and Himalaya Clause could limit Norfolk Southern's liability to Kirby, (the cargo owner) if Kirby is bound by the terms of that bill. If ICC had been acting as Kirby's agent when it entered into the shipping contract with Hamburg Sud, then ICC had authority to—and did—bind Kirby to the terms of the Hamburg Sud bill,

including its package limitation and Himalaya Clause. Thus the required "privity" between the shipper, Kirby, and the inland carrier, Norfolk Southern, would be satisfied.

Actually, the required "privity" is only some contractual relationship between a party claiming protection of a Himalaya Clause on the one who issued the clause. Thus, in *Mikinberg v. Baltic Steamship Co., Rice Unruh, Reynolds Company, and UTS, a Division of Universal Maritime Services*, 988 F.2d 327 (2nd Cir. 1993) the Second Circuit denied Himalaya Clause protection (limitations of liability) to Universal because Universal showed no "contractual relationship" with the ocean carrier, Baltic. The court said at 332:

> "There must be a contractual relationship between Universal and Baltic in order for the provisions of the 'Himalaya Clause to apply. Otherwise, any transporter in the flow of commerce would be automatically protected by a single bill of lading regardless of its privity of contract with the shipper or carrier. We decline to extend COGSA protections through the 'Himalaya clause to indefinite and unforeseeable defendants who have only an attenuated connection to the 'carriage of goods by sea."

The case was then remanded to the district court to allow Universal to establish what its relationship to Baltic was. However, in the case at bar, Norfolk Southern was not an unforeseeable defendant under either of the bills of lading. Both the ICC bill of lading and Hamburg Sud bill called for inland transportation in the United States, and all parties knew that such transportation was significantly more than an "attenuated connection." Neither contract could have been fulfilled without inland rail service.

V. THE ACTUAL CARRIER'S BILL OF LADING BINDS ALL PARTIES

Both the district court and the dissenting judge below, *Kirby* at 1312, determined that ICC was acting as Kirby's agent and that ICC was not going to ship the goods other than by contracting it with another carrier. Kirby accepted a limitation of liability and Himalaya Clause in the written contract with ICC. As the dissent below points out at page 1312 ". . . that would include a limitation for Hamburg Sud." The dissent also states that it should also include the Norfolk Southern. More importantly, the dissent below agrees with *amicus* that ". . . . Kirby was bound by the Hamburg-Sud bill of lading . . .'.

Amicus submits that the rule in cases such as this should be that which the United States, as *amicus curiae*, discusses at page 18 of its brief filed in this proceeding:

> "This Court's decision in *Great Northern Railway, Co. v. O'Connor*, 232 U.S. 508 (1914) suggests, that when a carrier accepts goods for transport from an intermediary, the liability limitations in the carrier's terms of carriage are enforceable against the cargo owner regardless of whether the intermediary contracted with the carrier "as agent [of the cargo owner] or Forwarder.' *Id.* at 514."

In that case this Court stated at 515 that, "if the Forwarder was shipper for the purpose of securing carload rates, it was also shipper for the purpose of classifying and valuing, in order to determine which tariff was applicable. . . . "the carrier has the right to assume that the [Forwarder] could agree upon the terms of the shipment, some of which were embodied in the tariff. The carrier is not bound by [the shipper]'s private instructions or limitation on the authority of the [Forwarder], whether it be treated as agent or Forwarder." And at 516 the Court concluded that:

> ". . . The carrier, in the absence of something showing rebating, or false billing, is entitled to collect the rate

which applies to goods of that class, and if sued for their loss is liable only for the loss of what the shipper had declared them to be in class and value."

The net result is that the shipper is bound by the terms of the contract (bill of lading) entered into for the shipment of its goods between an actual carrier and transportation intermediary engaged by the shipper including the lower ocean freight rate and the limitation of liability provisions in the ocean carrier's bill of lading.

Finally, in *Nippon Fire & Marine Insurance Co, Ltd., v. Skyway Freight Systems, Inc., American International Airways, Inc. and United Airlines, Inc.*, 235 F.3d 53 (2nd Cir. 2000), the Second Circuit held at page 61 that as between an intermediary's bill of lading and the actual (secondary) carrier's bill of lading, the latter governs the rights of the shipper and the actual carrier. In that case the secondary carrier's bills of lading restricted the nature of a claim the shipper and its intermediary could bring against them for loss or damage–breach of contract, and not tort or bailment. The court found that limitation of liability binding on the shipper and its insurer. Since the shipper/insurer did not state a claim for breach of contract, the claim against the actual (secondary) carriers was dismissed.

CONCLUSION

The court below applied the wrong bill of lading and its limitation of liability provisions. It should have applied the bill of lading issued by Hamburg Sud, not that issued by ICC, and by the court's own reasoning the decision of the district court should have been affirmed. This Court can and should put the issue to rest and avoid future litigation concerning who is what, and what rights does it have in intermodal international transportation. It can do so by finding a transportation intermediary's contract or bill of lading with its shipper client is not binding on the carrier actually performing the transportation. The governing contract or bill of lading setting forth the rights of the shipper *vis-à-vis* those who actually perform the transportation functions is the one issued by the actual carrier to the transportation intermediary.

If the decision below is left to stand, ocean carriers involved in through intermodal transportation such as that in the instant case will have to take steps to protect themselves and their subcontractors from the effect of deficient intermediary bills of lading. One such step could be to require all intermediaries to name themselves and their principal as shippers on the ocean carrier's bill of lading. Another possibility could be to require all intermediaries to state in the bill of lading they issue to the shipper that the terms of the actual carrier's bill of lading are included by reference in the intermediary's bill of lading. Another possibility could be for an ocean carrier to publish in the tariff it is required by § 8 of the Shipping Act, 46 U.S.C. app. § 1707 (2002) to "keep open to public inspection in an automated tariff system" its rates, rules, bills of lading, etc., a rule providing that its bill of lading takes precedence over any intermediary's bill of lading for goods carried by the ocean carrier.

All of those possible actions and others not prohibited by § 10 of the Shipping Act 46 U.S.C. app. § 1709 (2002), complicated cross indemnification agreements and other legal devices would be unnecessary if the decision below is reversed and a determination that the bill of lading issued by the actual carrier to a transportation intermediary holding itself out as a carrier—by whatever name—determines the rights and liabilities of the shipper.

Therefore, the decision below should be reversed by this Court.

Respectfully submitted,

THOMAS D. WILCOX *
CARROLL & FROELICH, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

* Counsel of Record

Attorneys for Amicus Curiae

March 24, 2004